In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1611

J. C. SMOTHERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted on fourteen counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to five years' imprisonment on each count, the terms to run concurrently, and fined a total of $1,400. The court of appeals affirmed (435 F. 2d 209; Pet. App. 1a-7a), and on December 30, 1970, a petition for a

rehearing *en banc* was denied (Pet. App. 8a). On January 26, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until February 28, 1971. After the death of petitioner's original counsel on February 22, 1971, present counsel, on March 16, 1971, filed an application for a further extension of time. This was denied by Mr. Justice Marshall on March 23, 1971, "without prejudice to the filing of a petition for a writ of certiorari for review by the Court." The petition was filed on April 22, 1971.

Between October 1965 and June 1966, petitioner, founder and president of Southern Illinois Co-op Sales Company (Tr. 17-20, 216), directed his bookkeeper to prepare a false set of financial records for the company (Tr. 23). These records consisted of false copies of bills of lading, assignments of nonexistent accounts receivable, and other false documents relating to purported sales of coal which never were made (Tr. 35-40, 178-184). Through use of the false documents, petitioner's company obtained loans in excess of one million dollars from First National Bank in Gorham, Illinois, which in turn sold the notes to First National Bank of St. Louis, in St. Louis, Missouri, pursuant to a participation agreement (Tr. 142-143, 177-184, 219). Through fourteen separate mailings, the Gorham Bank transmitted the false documents from petitioner's company to the St. Louis Bank which was providing the funds (Tr. 63-77, 117-122, 142-143).

1. Petitioner argues that he cannot be said to have caused the use of the mails between the two banks because he did not know when the National Bank of

Gorham would solicit participations from other banks or which loan transactions would be involved. Under *Pereira* v. *United States*, 347 U.S. 1, 8-9, all that is required is proof that a defendant could reasonably foresee use of the mails. Here, petitioner knew that the Gorham Bank maintained a limit of $25,000 on the amount which could be loaned to any one customer (Tr. 117-122, 142-143, 177-184, 219-220); he was aware of the participation agreement between the banks (Tr. 220). Representatives from the St. Louis bank, including its vice-president, frequently visited petitioner's company, and usually they dealt directly with petitioner, who showed them false financial records of the company which had been prepared at his direction (Tr. 25, 34, 39-40, 115, 220, 223). Moreover, on one occasion, prior to six of the mailings charged in the indictment, the vice-president of the St. Louis bank informed petitioner that the interest rate on the loan was being raised (Tr. 115-116).

2. The mailings from the Gorham Bank to the St. Louis Bank were not, as petitioner contends (Pet. 7-8) merely incidental to his scheme to defraud. Petitioner submitted false documents to the Gorham Bank with the understanding that they would be forwarded to the St. Louis Bank for review (Tr. 106-107, 117, 143, 217). The St. Louis Bank required that these documents be submitted to facilitate its assessment of the company's financial condition, and advised that no funds would be available to petitioner unless that assessment was favorable. The mailings to the St. Louis Bank of the documents containing false representations were thus essential to petition-

er's scheme to defraud. See *United States* v. *Goldberg*, 401 F. 2d 644, 647 (C.A. 2), certiorari denied, 393 U.S. 1099; *Bannister* v. *United States*, 379 F. 2d 750, 753 (C.A. 5), certiorari denied, 390 U.S. 927.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 425374 648